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In The

Supreme Court of the United States

October Term, 1985

AMERICAN MINING CONGRESS, AND UNITED NUCLEAR CORPORATION, *ET ALIA*, CHAUNCEY KEPFORD (PRO SE),

Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

INTERVENOR—RESPONDENTS ENVIRONMENTAL DEFENSE FUND'S AND SIERRA CLUB'S BRIEF IN OPPOSITION

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INTERVENOR—RESPONDENTS ENVIRONMENTAL DEFENSE FUND'S AND SIERRA CLUB'S BRIEF IN OPPOSITION

The American Mining Congress ("AMC"), United Nuclear Corporation, *et al* ("UNC"), and Chauncey Kepford (pro se) each separately petition for a writ of certiorari to review two closely related judgments of the United States Court of Appeals for the Tenth Circuit.

The judgments below were entered on September 3, 1985. Rehearing was denied on October 30, 1985.

The Environmental Defense Fund and Sierra Club were petitioners and intervenor-respondents in the cases below. For the reasons stated herein, the Environmental Defense Fund and Sierra Club respectfully urge that UNC's and AMC's petitioners for a writ of certiorari be denied, and that Chauncey Kepford's be granted.

OPINIONS BELOW

The opinion of the court below, upholding (with one exception not relevant here) the Environmental Protection Agency's standards for cleaning up uranium mill tailings at abandoned tailings sites, is reported at 772 F.2d 616. The opinion of the court below, upholding the agency's standards for disposal of uranium mill tailings at active mill sites, is reported at 772 F.2d 640. The Environmental Protection Agency notices of final rulemaking were published at 48 Fed. Reg. 590 (January 5, 1983) and 48 Fed. Reg. 45926 (October 7, 1983). These materials have been reproduced by both UNC and AMC, and filed with their petitions.

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Uranium Mail Tailings Radiation Control Act of 1978, codified as amended at 42 U.S.C. § 2014 and at scattered sections thereafter, and at 42 U.S.C. §§ 7901-7942, are reprinted in petitioners' appendices. The Environmental Protection Agency's Standards for Remedial Actions at Inactive Uranium Processing Sites ("Inactive Site Standards") and the agency's Environmental Standards for Uranium and Thorium Mill Tailings at

Licensed Commercial Processing Sites are codified at 40 C.F.R. Part 192 and are reprinted in petitioners' appendices.

STATEMENT OF THE CASE

The petitions filed by American Mining Congress and United Nuclear Corporation have one attribute in common: both misrepresent the seriousness of the health risks associated with uncontrolled uranium mill tailings.[1] As a consequence, it is necessary to set the record straight to understand the threat to the public presented by radiation and other toxic substances released to the environment as byproducts of the process for extracting uranium oxide from uranium ore.

A. The Evidentiary Record Supports Congress' Decision to Require Standards

Most uranium mills produce partially refined uranium, called "yellowcake," by processing finely crushed uranium ore through a series of acid baths that leach out 80 to 90 percent of the uranium isotopes. Since the uranium content of the ore averages only about 0.15 percent, virtually the entire bulk of the ore that is mined and processed is discarded as waste known as "tailings." 48 Fed. Reg. 45926, 45927. With the exception of the extracted uranium, most of the radioactivity in the mined ore remains in the tailings because radium, thorium and other isotopes in the chain of radioactive decay are not extracted.[2] The tail-

1. Currently, only one major thorium mill is licensed, while there are twenty-six active uranium mills. This brief uses the term "uranium mill tailings" or "mill tailings" to refer to the waste product of both uranium and thorium mills.

2. Most of the uranium recovered from crude ore is uranium-238, which naturally decays over time to lead-206 (a stable, or nonradioactive element). Most of the intermediate decay

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ings also contain residues of a variety of hazardous substances that are used in the extraction process or that are produced as a result of exposing all the minerals in the ore to an acid bath. In short, the tailings bear little resemblance to the physically and chemically stable ore-bearing formation from which they are derived.[3]

As of January 1983, there were twenty-seven licensed uranium mills, of which fourteen were operating. 48 Fed. Reg. 45927. By that date, 175 million metric tons of uranium mill tailings had accumulated at the active mill sites. *Id.* Based on Department of Energy statistics, the Environmental Protection Agency (EPA) estimated that an additional 175 million metric tons of tailings will be generated in this country by the year 2000. Finally, another twenty-six million metric tons of tailings remain to be disposed of at the twenty-six abandoned mill sites designated for clean-up under the Uranium Mill Tailings Radiation Control Act (UMTRCA). 48 Fed. Reg. 592.

1. Radiological risks associated with tailings

While mill tailings emit both radioactive particulates and gamma radiation to the ambient atmosphere, total exposure estimates show that the release of radon gas to the atmosphere is the single greatest hazard to human health. 48 Fed. Reg. 593 Radon is a radioactive, but chemically inert, gas that is produced by the radioactive

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products in the uranium series become part of the tailings. Thorium-230 is the radionuclide with the longest half-life, and it decays to form radium-226, and then to radon-222. 1 *Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing* 3-2 to 3-3 (Sept. 1983) (hereinafter ctied as *Active Site EIS*).

3. *See* Nuclear Regulatory Commission, 1 *Final Generic Environmental Impact Statement on Uranium Milling* at 4 (Sept. 1980) (hereinafter cited as *Generic Impact Statement*).

decay of radium, which in turn is the product of the decay of thorium. Radon has a half-life of 3.8 days so that after 12 days, 90% of it will decay to polonium, a solid that stays put. When radon is formed in the undisturbed formations from which uranium ore is extracted, most of it decays and remains locked in the earth before it can diffuse to the atmosphere. But when radium in the uranium ore is bought to the surface and pulverized in the mill for processing, radon is released directly to the atmosphere. Radon is released in much higher concentrations from tailings piles than it is from undisturbed soil and rock: radon emissions from an acre of tailings are about 200 to 900 times greater than from an acre of undisturbed soil. 1 *Active Site EIS* at 3-5. As a result, the air above and downwind of piles contains much higher radon concentrations than would otherwise be present as a result of background emissions from the earth. *Id.*

Radon gas presents a unique hazard to human health because it diffuses readily into the atmosphere from tailings and exposes the cell layer lining the lung to a concentrated dose of radiation. Monitoring studies performed downwind from abandoned tailings piles show radon levels 5 to 12 times greater than "normal" background concentrations.

Radon undergoes eight radioactive decay events before it transforms into nonradioactive lead. Three of these decay events produce alpha particles[4] and occur within one hour after the first. Unlike radon, these "daughter"

4. Alpha particles are composed of four nuclear particles (neutrons and protons) and therefore have many times greater mass and weight than do gamma or beta radiation. Thus, alpha particles can do significant damage to any cell they penetrate, including causing changes in the genetic code of a cell which can make it become cancerous.

isotopes are electrically charged and, if inhaled, will stick to the bronchial epithelium—an especially vulnerable tissue.[5] For persons exposed to above-normal radon levels, the lungs are continually bombarded by excess alpha radiation as radon and its daughters decay.

Consequently, radon is recognized as a potent carcinogen. As EPA concluded, epidemiological studies of underground miners demonstrate that there is a substanstantially increased risk of lung cancer due to elevated exposure to radon decay products. 48 Fed. Reg. 45928. Working from the best available scientific evidence, EPA developed a methodology for correlating excess risk of fatal lung cancers with radon exposure. While EPA conceded that its estimates of risk from inhalation of radon decay products exceed those of some agencies, EPA's risk estimate is essentially identical to that prepared by a subcommittee of the National Academy of Sciences[6] and is about 20% lower than that of the Atomic Energy Control Board of Canada.[7] *Id.* EPA also concluded that a linear dose response curve should be used in quantifying risk from radon, even though a linear dose response curve may *underestimate* risk at low exposure levels.

From its analysis, EPA reached several conclusions of importance here. First, lung cancer attributable to radon exposure is the dominant radiation hazard from tailings. The risk of fatal lung cancer for persons exposed continuously to radon concentrations found near a tailings pile is as high as 2 persons in 100. *Id.* at 45929. Second,

5. See 1 *Generic Impact Statement* at C-4.

6. National Academy of Sciences, *The Effects on Populations of Exposure to Low Levels of Ionizing Radiation* (1980).

7. D.C. Thomas & K.G. McNeill, *Risk Estimates for the Health Effects of Alpha Radiation* (1982) (prepared for Atomic Energy Control Board of Canada).

based on models for the cumulative risk to all exposed populations, the radon released from inactive tailings piles, uncontrolled existing piles at active mill sites and new tailings expected to be added by year 2000 would cause more than 800 lung cancer deaths per century. *Id.;* 48 Fed. Reg. 593. And third, EPA showed that its standard for tailings disposal would *reduce* the risk for maximally exposed populations to only about 1 in 1000. 48 Fed. Reg. 45937.

2. Risks from nonradioactive toxic substances

While the threat of ground water contamination engendered less scientific debate, the risk associated with nonradioactive toxic substances is no less real. Mill tailings can contain, depending upon the ore source and the chemical reagents used in the milling process, high concentrations of toxic substances such as arsenic, lead, selenium, and molybdenum. 1 *Active Site EIS* at 3-8. And because the tailings consist of both liquids and solids, toxic substances can leach from a disposal site and can migrate through the underlying soil to contaminate ground water. Indeed, ground water contamination is *known* to have occurred at eight inactive and seven active uranium mill sites and may be occurring at others, where monitoring investigations have not yet been conducted. 48 Fed. Reg. 45931. As a consequence, the EPA's standards establish a regulatory program for detecting and cleaning up ground water contamination.

B. Statutory and Regulatory Background

"From the early 1940's through the 1970's there was little official recognition of the hazards presented by these tailings. Federal regulation of the industry was minimal."[8] Nevertheless, evidence was accumulating that the

8. H.R. Rep. No. 1480 (Part 1), 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7433.

front end of the nuclear fuel cycle posed real risks to human health and the environment. The health risks linked to misuse of tailings in the construction of houses and other structures gave an added impetus for congressional action. And by the time Congress began hearings on uranium mill tailings, the record was compelling. In testimony before Congress, EPA stated that radon gas is "a very carcinogenic material," and that even if controlled to twice background the risk of lung cancer "is 100 times higher than the risk we get from the air pollutants vinyl chloride or benzene which are very carcinogenic."[9] [EPA ultimately selected a standard that reduces radon emissions only to a level that is *twenty* times background.]

In response to the evidence before it, Congress determined that "[l]egislation is needed now to stabilize and control all such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public."[10] Title I of the Uranium Mill Tailings Radiation Control Act of 1978 established a program for reclamation of mill tailings at inactive mill sites by the U.S. Department of Energy. To deal with active mill sites, Title II directed EPA to establish standards of general application "for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with" uranium processing and disposal of byproduct materials (tailings). 42 U.S.C. § 2022(b)(1).

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9. *Uranium Mill Tailings Control Act of 1978: Hearings on H.R. 11698, H.R. 1229, H.R. 12938, H.R. 12535, H.R. 13049, H.R. 13650 Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 95th Cong. 2d Sess. 400 (1978).

10. H.R. Rep. 1480 (Part 2), 95th Cong. 2d Sess. 29 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7456.

On January 3, 1983, EPA issued final standards for disposal of tailings at inactive mill sites. EPA set numerical limitations on radon emissions from the piles and also set standards for cleaning up homes and other structures constructed with tailings. 48 Fed. Reg. 590-604; 40 C.F.R. Part 192, Subparts A-C. The radon emission limitation requires installation of "covers" over the tailings to trap the radon long enough for it to decay before it is released to the air, but the standards do not specify the details of cover design or mandate use of specific cover materials. 48 Fed. Reg. 595. The residential standard requires the removal of tailings used as landfill or used in concrete to build basements, foundations, patios and driveways. *Id.*, 595-96.

On October 7, 1983, EPA issued nearly identical radon standards for disposal of tailings at active mill sites. 48 Fed. Reg. 45926-45927; 40 C.F.R. Part 192, Subparts D-E. As it had done for inactive sites, EPA concluded that tailings should be controlled to reduce radon emissions to 20 picocuries per square meter per second (20 pCi./m^2/sec), but left to the Nuclear Regulatory Commission the responsibility for determining what measures must be implemented to ensure achievement of this standard at specific sites. 48 Fed. Reg. 45933. Unlike the inactive site standards, EPA also promulgated primary and secondary standards for preventing or remedying ground water contamination. Those standards are modeled upon the standards issued pursuant to Subtitle C of the Solid Waste Disposal Act, as amended, (also known as the Resource Conservation and Recovery Act) as Congress directed in UMTRCA. 42 U.S.C. § 2022(b)(2). Thus, mill licensees are required to monitor for ground water contamination and must undertake corrective action if groundwater contamination in excess of specified concentrations is discovered.

REASONS WHY UNC'S AND AMC'S PETITIONS SHOULD BE DENIED

A. The Decision Below Is Not At Odds With The Statutory Command Or With Prior Decisions Of This Court

UNC maintains that EPA ignored congressional intent and a prior decision of this Court by failing to make a threshold finding of "significance." AMC maintains that EPA violated congressional intent by setting standards that apply within the boundaries of mill sites. Both petitioners clearly are wrong. In these two respects, EPA's standards are not in conflict either with the language of the statute, with the congressional intent, or with prior decisions of this Court.

1. No agency finding of significance is required

UNC relies heavily on this Court's decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (the *Benzene* case) for the proposition that prior to regulating releases of radioactive and other hazardous substances from mill tailings, EPA must independently assess the health risks associated with those emissions and then determine whether the health benefits to be gained from regulation are "significant." The *Benzene* decision clearly does not apply here. In that case this Court was construing a *different* statute. This Court's decision in the context of that statute does not govern the statutory scheme before the Court in the present case.

Benzene reversed the decision of the Secretary of Labor to reduce permissible levels of worker exposure to benzene under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("OSH Act") That statute

delegates "broad authority to the Secretary to promulgate different kinds of standards" to reduce exposure to all sorts of hazardous materials in the workplace. *Benzene*, 448 U.S. at 611. The purpose of that Act is "to assure so far as possible *every working man and woman in the Nation* safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The statute applies, in one estimate, to *sixty million* workers, *Benzene*, 448 U.S. at 691 (Marshall, J. dissenting), and embraces regulation of the full range of carcinogenic and toxic substances found in the workplace.

No single rationale was adopted by a majority of the Court in Benzene. But in response to a decision to reduce exposure to benzene based solely on the agency's policy of reducing exposure to carcinogens, the Court read section 3(8) of the OSH Act to require

> the Secretary to find, as a threshold matter, that the toxic substance in question poses a significant health risk in the workplace and that a new, lower standard is therefore *"reasonably necessary or appropriate* to provide safe or healthful employment and places of employment."

Benzene, 448 U.S. at 614-15 (quoting section 3(8) of the Act) (emphasis added).

This Court's decision, remanding the benzene standard to the Secretary for a threshold finding of "significance," turned on the precise terms of the Act's language. The central question addressed by Benzene was whether evidence that a contaminant is a carcinogen, without any regard for the magnitude of the potential hazard it posed to workers, a legally sufficient factual predicate for the Secretary to exercise his discretion to commence the standard-setting process under the OSH Act. The Court held

that a judgment regarding the degree of hazard was required before the Secretary could find that a new standard was "reasonably necessary." This Court did not, in the *Benzene* case, establish a general rule of law of sweeping scope that includes within its purview statutes, such as the Uranium Mill Tailings Radiation Control Act, in which Congress has already decided that regulations were necessary.

UMTRCA was enacted by Congress to deal with the specific health hazards attributable to mill tailings at both abandoned and active mill sites. Congress had determined, before the Act was passed, that radioactive emissions from tailings pose a serious threat to human health and that they should be stabilized and controlled. Unlike the OSH Act, Congress did *not* merely authorize the Adminstrator of the EPA to evaluate whether regulatory action is needed and then set standards if he found them to be "reasonably necessary or appropriate." Rather Congress mandated action by EPA and set an ambitious schedule for promulgation of standards. The realm of discretion left to the Administrator was substantially narrowed compared to the OSH Act. The threshold question of whether to regulate was already decided. The only remaining issue is to what degree.

"Statutory analysis must begin, of course, with the language of the statute." *Watt v. Alaska*, 451 U.S. 259, 265 (1981). The language of UMTRCA leaves little doubt as to Congress' intent. The express purposes of this Act are to provide

> (1) in cooperation with the interested states, Indian tribes, and the persons who own or control inactive mill tailings sites, a program of assessment and *remedial action* at such sites. . . .

> (2) a program *to regulate* mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations *in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public.*

42 U.S.C. § 7901(b) (1), (2) (emphasis added).

In order to ensure achievement of those purposes, Congress mandated EPA, in virtually identical language, to promulgate "standards of general application for the protection of public health, safety, and the environment from radiological and nonradiological hazards" associated with mill tailings at both active and inactive mill sites. 42 U.S.C. §§ 2022(a), (b). Further, Congress established in the Act a comprehensive program—including the details of site ownership and creation of indemnity funds—for carrying out stabilization, control, and disposal of tailings, leaving little doubt of the legislature's intention.

This legislative scheme reveals *no* indication that Congress intended that, at the outset, EPA should determine *whether* generally applicable standards are needed. Congress merely delegated to EPA the authority to determine *how* mill tailings were to be reclaimed. The legislative history and the policies that Congress sought to implement buttress that conclusion. *See Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

In its discussion of need, the House Interior Committee stated that tailings "contain many naturally-occurring hazardous substances, both radioactive and nonradioactive," including radon gas. H.R. Rep. No. 1480 (Part 1), 95th Cong., 2d Sess. at 11 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7433. Thus, the Committee stated that UMTRCA "is intended to protect

the public health and safety and the environment from hazards associated with" uranium tailings. *Id.* at 13, *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7435. And the Committee certainly envisioned promulgation of standards of general application by EPA. *Id.* at 16-17, *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7438-7439. The Commerce Committee report mirrors these statements of congressional intent. H.R. Rep. No. 1480 (Part 2), 95th Cong., 2d Sess. at 29, 34-35 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7456, 7461-7462.

Not only is there no explicit evidence that Congress intended EPA to make a "significance" finding, there also is no implicit evidence to that effect. Petitioners' efforts to pull this case within the principles enunciated by the plurality in the *Benzene* case are unavailing.[11] In this instance, EPA did what Congress directed it to do: it evaluated the sources and pathways of human exposure to toxic substances, and issued standards to reduce radiation health hazards.

The 1982 amendments to UMTRCA do not counsel a different conclusion. Pub. L. No. 97-415, § 22(b), 96 Stat. at 2080, *codified at* 42 U.S.C. § 2022(a), (b). The Conference Report emphasizes that the amendments were intended merely to clarify that when EPA set standards it should "consider the risk to public health, safety, and the environment, the environmental and economic costs of such standards of regulations, and such other factors as EPA or NRC, respectively, determine to be appropriate."

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11. Petitioners somewhat disingenously suggest that in this case EPA maintained that it must set standards "without regard to the significance of" risks. United Nuclear Corporation, *et al., Petition for a Writ of Certiorari* at 14. To the contrary, EPA examined a *range* of standards and weighed a number of factors, including an assessment of health risks attributable to radiation and other health hazards released from the tailings.

H.R. Rept. No. 884, 97th Cong., 2d Sess. 47 (1982). The conferees certainly never indicated that they wished to impose another hurdle to promulgation of standards or that they intended to make discretionary the duty to set standards. Indeed they expressed strong disappointment that EPA had failed to meet the statutory deadline for standards, and reemphasized that "EPA and NRC recognize as their paramount responsibility protection of the public health and safety and the environment." *Id.* at 47.

Viewed as a whole, the language of UMTRCA and the record of the legislative process demonstrate that Congress expected swift issuance of standards to eliminate or minimize health hazards from mill tailings. Congress manifestly did not impose a threshold burden of finding that those risks are "significant," since Congress already decided that standards were required. Thus, the teachings of the *Benzene* case are inapposite. The regulated community no doubt finds the EPA standards unwelcome. But petitioners' effort to draw into question the agency's authority has no basis. Petitioners' recourse properly is to Congress, not to this Court.[12]

2. EPA did not exceed its statutory authority

AMC takes a different tack in challenging EPA's standards. AMC asserts that the language used in UMTRCA, requiring issuance of "standards of general application," should be read to preclude standards that operate within the confines of a mill site. As with the

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12. As the Court has said before, it should "reject a theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent and that restricts . . . a remedial Act. . . ." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), *quoting Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 278-79 (1977).

other industry petition, AMC can point to no explicit or implicit statement that supports their position.

It is true, as petitioners point out, that prior to enactment of UMTRCA, EPA's authority under the Atomic Energy Act was limited by the 1970 Reorganization Plan[13] to issuance of "generally applicable environmental standards" that were specifically defined as limits on exposure "in the general environment outside the boundaries" of regulated facilities. But the UMTRCA legislative history makes clear that Congress intended to close a large gap in regulation of health risks associated with mill tailings, and that EPA standards were to play an important role in this new regulatory structure. UMTRCA does not adopt the language from the 1970 reorganization plan and does not limit EPA's standards to areas outside the boundaries of mill tailings sites. The legislative history contains no hint that Congress intended such a result.

On the contrary, the bill reported out of the House Interior Committee would have accomplished the result AMC contends for here had it not been amended. The Interior Committee bill mandated promulgation of generally applicable standards "for the protection of the general environment outside the boundaries of" uranium tailings sites. H.R. Rep. No. 1480 (Part 1), 95th Cong., 2d Sess. 6 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7433.[14] But the bill reported out by the Commerce Com-

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13. Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U.S.C. App. p. 1132 (1982).

14. Even had that provision been enacted into law, it would not have barred issuance of standards that *apply* within the boundaries of a mill site if EPA determined such standards were needed to protect the environment outside the site boundaries.

mittee a few weeks later, drafted to reconcile several different bills, did not include that limitation. H.R. Rep. No. 1480 (Part 2), 95th Cong. 2d Sess. 24 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7450. Instead, the bill enacted into law mandates issuance of "standards of general application" which are then to be implemented by NRC and the Department of Energy—without any limitation of the sort petitioners would have this Court engraft on the unambiguous statutory language.

Not only did Congress not limit EPA's authority in the manner argued by AMC, Congress contemplated standards that could be applied within mill site boundaries. First, it would have made no sense to limit EPA's authority at inactive mill sites to set standards that apply *outside* the boundaries of inactive tailings piles. These piles long since had been abandoned and were to be cleaned up with federal and state funds. Yet Congress used virtually identical language in directing promulgation of standards at both active and inactive sites. Congress rejected a geography-based limitation on standards. Congress clearly required a *functional* separation between EPA's role in standard-setting and the NRC/Department of Energy role in implementing those standards, but the fact that the NRC and DOE are charged with the duty to implement EPA's standards does not support a conclusion that EPA's standards are not to apply on-site.

Second, following House passage of H.R. 13650, that bill was put before the Senate. 124 Cong. Rec. 36687 (1978), which already had considered its own bill. Senator Garn proposed an amendment in the nature of a substitute to the House-passed bill, *id.* at 36688, which had been "coordinated in advance with the House." Again, that bill

made no mention of any site-boundary limitations on EPA's authority.

Senator Randolph, chairman of the Environment and Public Works Committee, cosponsored the Garn amendment. Senator Randolph stated that the section-by-section analysis of a similar Senate bill (S. 2584) provided the basis for his support of H.R. 13650. 124 Cong. Rec. 36697 (1978). That analysis "attempted to further define" the relative roles of NRC and EPA, and stated that "[EPA] is . . . to prescribe general standards of performance, not specific management requirements and not site-specific." *Id.* In elaborating on that analysis, Senator Randolph stated his understanding that EPA's standards could include general standards for site design and preparation; general pile stabilization standards; and *limitations on emissions from mill tailings* "in the air or ground or surface waters. . . ." *Id.* EPA's limit on the release of radon from tailings is clearly consistent with the measures described by Senator Randolph.[15]

AMC is unable to point either to statutory language or to legislative history to support the theory it advances before the Court. The Act and its history simply do not support petitioner's argument that the lower court's decision is at odds with congressional intent.

Petitioner's reliance upon *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), is similarly misplaced. In *Train*, the court of appeals concluded that EPA was required by the Clean Water Act to regulate discharges of radioactive pollutants, including "source,

15. The Garn amendment was adopted and passed by the Senate, 124 Cong. Rec. 36699 (1978). Subsequently, the House approved the Senate bill with only slight modifications not relevent here. *Id.* at 38230.

byproduct, or special nuclear materials" as defined by the Atomic Energy Act. In doing so, the appellate court relied exclusively on the statute's language, and ignored explicit guidance found in the legislative history to the effect that such discharges are not covered by the Clean Water Act. *Train,* 426 U.S. at 11. On the basis of those legislative materials, this Court reversed the appellate court decision.

The contrast between *Train* and the law of this case is compelling. There is no evidence from the legislative materials that in enacting UMTRCA Congress intended to artificially constrain EPA to the issuance of standards that apply only outside the boundaries of a mill. In fact, the contrary is true. Consequently, there does not exist in this case either a conflict between the Tenth Circuit's decision and prior decisions of this Court or an erroneous construction of a federal law the purpose of which was to prevent or minimize human exposure to radioactive and other toxic substances.

B. The EPA Standards Will Be Implemented Without Causing Conflict Among Federal Agencies

AMC also contends that the EPA standards will disrupt the administrative framework for regulating uranium mills and mill tailings. However, this argument does not withstand careful scrutiny and can be easily disposed of.

On October 16, 1985, the Nuclear Regulatory Commission issued final rules to conform its mill tailings requirements to the EPA standards. 50 Fed. Reg. 41852-41866 (Oct. 16, 1985). During that proceeding the industry petitioners made much the same arguments as they advance before this Court. *See* 50 Fed. Reg. 41853-54 (legal arguments on EPA/NRC jurisdictional issue). In response, the Commission concluded that "EPA generally

acted within its jurisdiction and found the [AMC] arguments flawed." *Id.*

Thus, the Commission already has completed one round of rulemaking to adopt and enforce the EPA standards, and has begun a second round of rulemaking to deal with EPA's ground water protection requirements, 49 Fed. Reg. 46425 (Nov. 26, 1984). It appears that the agencies do not share AMC's concern that EPA's standards may disrupt implementation. They appear to be resolving the difficulties that are inherent in inter-agency coordination and there is no basis for assuming that the agencies will not continue to cooperate in carrying out the mandate of UMTRCA.

THE KEPFORD (PRO SE) PETITION

Kepford presents two questions: 1) the illegality of executive office intervention in the rulemaking, and 2) EPA's failure to identify, analyze and consider alternatives for tailings disposal that would guarantee long-term control consistent with Congressional intent. Both questions deserve review by this Court.

1. OMB's Role in the Rulemaking

Kepford argues that the Executive, through the Office of Management and Budget ("OMB"), unconstitutionally interfered in the decision delegated by law to the Administrator of the Environmental Protection Agency. The central premise underlying Kepford's argument is that the Executive may not direct executive branch officials to act contrary to law. The ultimate inquiry we believe, is whether OMB's unquestioned influence over the final decision[16] resulted in a rule that violated the Congressional mandate of UMTRCA. We think it did.

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16. EPA never disputed Kepford's claim below that OMB directly influenced the outcome of the Agency's decision in the rulemaking.

OMB pressure was aimed at forcing EPA to adopt a cost-benefit approach to setting health standards.[17] It succeeded. EPA's initial mill tailings proposal contained no balancing of costs vs. benefits, but rather considered costs only in the context of choosing from among those regulatory options that would achieve the health protection goal defined by the Agency on the basis of cancer risk.[18]

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17. In sworn testimony on September 27, 1983, before the House Subcommittee on Oversight and Investigations, John E. Daniel explained that OMB pressured EPA to take a cost-benefit approach in the uranium tailings rulemaking contrary to the advice of EPA attorneys. Mr. Daniel was chief-of-staff to the Administrator, Anne Burford, at the time of those events. An excerpt from the hearing transcript is quoted here:

> Mr. Gore: Do you know of any instances in which OMB directed EPA to take regulatory action which the Agency believed was contrary to a specific statute?
>
> Mr. Daniel: * * *
>
> The other example I would cite to you, Mr. Gore, is with respect to something called uranium mill tailings. * * * EPA's role in this is purely one of setting the health standard for a person that would be exposed to the tailings pile. In terms of the costs that were involved, ultimately it would be the Department of Energy that would have paid for those through proposed funds. So the check, the cost-benefit analysis of this, was in the hands of the Congress. Our job is just to set the health standards.
>
> But we were urged to set different kinds of standards that would have been based on the cost of doing these cleanups of these mill tailings piles that were out of line with what the statute told us, at least on the basis of advice we were getting from our lawyers at EPA, as to the constraints on the Agency to set the standards.
>
> Mr. Gore: Did you tell them that would be a violation of the law?
>
> Mr. Daniel: We did.

Hearings before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, H.R. 98-98, September 27-28, 1983. See also the letter from OMB to EPA cited by Kepford.

18. *Draft Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites* at 8-6 (EPA, December, 1980).

But the final rule specifically relied on what EPA described as an "optimized cost-benefit" approach. 48 Fed. Reg. 591 (January 5, 1983). Although EPA in the inactive site rulemaking never explained what it meant by "optimized cost-benefit," or how it went about calculating which regulatory option best fit the "optimized cost-benefit" approach, the Agency had fully succumbed to OMB's pressure to weigh costs directly against health benefits, and abandoned the approach of defining health protection goals first, then looking for the most cost-effective way of meeting those goals.

The consequence of the OMB approach was EPA's rejection of standards it had initially proposed that were far more protective of health than the final standards. EPA's initial limit on the release of radon from tailings would have reduced radon emissions to two times the natural radon emissions from undisturbed earth. 46 Fed. Reg. 2559, col. 1-2 (January 9, 1981). This standard, EPA concluded, would "virtually eliminate" all lung cancer deaths attributable to radon from tailings.[19] In contrast, EPA's final standard for both inactive and licensed tailings piles, based on OMB's optimized cost-benefit approach, allows radon emissions 20 times higher than natural emissions. According to EPA, the final standards will allow about 35 deaths per century for the first 10 centuries, and then many more deaths during the next 800 to 1,000 centuries.[20]

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19. 1 *Final Environmental Impact Statement for Remedial Action Standards For Inactive Uranium Processing Sites* at 101 (EPA, October, 1982) ("Inactive EIS").

20. EPA calculated that its relaxed radon standard for active piles would allow about 25 deaths per century, and permissible radon releases from inactive tailings piles would cause 10 deaths per century. Inactive Site FEIS, vol. 1, 101; Active Site FEIS, vol.

(Continued on following page)

EPA also claims to have relied on OMB's cost-benefit approach as the reason for substantially weakening the standard that triggers the removal of tailings from homes and other structures. EPA's indoor radon standard would not trigger cleanup even when individual lung cancer risks are as high as 1.3-in-100 (about 1-in-65). Inactive Site EIS, Table 7-1, 108.

2. Cost-benefit analysis not consistent with UMTRCA

Clearly, the 1983 Amendment to UMTRCA directed EPA to "consider costs."[21] But as this Court has held, authority to consider costs is not the same as authority to

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1, 10-6. EPA only considered the fatalities that will result from the radon released during the period of compliance with the standard, i.e., the first 10 centuries, Inactive Site EIS, 98-100; even though EPA concedes that tailings will continue to emit radon at approximately the current rate for about 1,000 centuries. Inactive EIS, 16-17. Presumably this is because the rule only requires tailings controls to be effective for 200 to 1,000 years. As Kepford has argued, EPA has not explained its decision not to account for the rapid increase in deaths that will occur after the first 10 centuries when the earthen covers erode. In calculating future fatalities EPA also assumes that no new tailings will be created after year 2000, even though EPA projected that total tailings will double by year 2000 as a result of continuing production.

21. EPA performed a cost impact analysis that shows the industry could afford to achieve the standards that would prevent all deaths. EPA found that the costs of the more stringent standards *might*, at most, force only one small mill to close. Final Regulatory Impact Analysis ("FRIA"), Table 5.5, 5-12. EPA also found it would cost $120,000 per life saved to eliminate virtually all fatalities, compared to $80,000 per life saved for the standard EPA chose. Average Cost Per Death Avoided, Table 4.6, FRIA, 4-11. EPA found that the cost of both standards was acceptable in reference to the costs the public says it is willing to pay to save a life: "all control methods fall below the lower end of the empirical range." FRIA, 4-12. EPA also decided that the $0.07 to $0.09 added to each homeowner's monthly utility bill that would result from choosing to prevent all deaths was certainly not a basis for rejecting that option.

base decisions on a formalized cost-benefit analysis. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 488, 510 (1981). Here none of the statutory indicators identified by this Court in *Donovan* as providing authority for cost-benefit analysis are present.

As the Court in *Donovan* recognized, cost-benefit analysis gives the decision-maker virtually unbridled discretion to select the outcome by the value assigned to benefits. Where the benefit is not valued in the marketplace, such as the value of human life, the degree of health protection to be provided has no bounds.

The Court rejected the argument that the OSH Act required cost-benefit analysis in setting worker health standards because

> . . . Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in [the Act]. Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.

American Textile Manufacturers Institute v. Donovan, 452 U.S. 488, 509 (1981). Given Congress' principal focus on protecting health from radiation, and its directive to control tailings to the "maximum extent allowed by the state of the art," the same principle applies to UMTRCA.

In addition to the lack of statutory language authorizing cost-benefit analysis, the conference committee report accompanying the 1983 amendment makes clear that Congress had no intention of delegating to EPA unfettered discretion to weigh health benefits against costs.

> Moreover, in adopting the language [requiring consideration of cost], the conferees intend neither to divert EPA and NRC from their principal focus on protecting the public health and safety nor to require that the agencies engage in cost-benefit analysis or optimization.

H.R. Rept. No. 97-884, 97th Cong., 2d Sess. 47 (1982). Congress did not authorize the "cost-benefit" approach which EPA says it used to select the radon standard in this case. EPA's rulemaking decision is clearly inconsistent with the mandate of the 1978 Act to "eliminate radiation health hazards to the public." It is also inconsistent with the express intent of the 1983 amendment to authorize consideration of cost, but not in an unbounded cost-benefit analysis.

In the legislative history of the 1978 Act, Congress declared its intent that hazards associated with mill tailings should be reduced to the degree achievable by the use of state-of-the-art technology, i.e., by what is feasible:

> Uranium mill tailings disposal sites should in all cases be controlled and regulated . . . to the maximum extent allowed by the state of the art, to insure that the public and the environment will be protected from the hazards of the tailings for as long as they may remain a hazard.

H.R. Rept. No. 95-1480 (Part I) 95th Cong., 2d Sess. 17-18 (1978). Thus to the extent Congress intended EPA to consider factors other than the human health and environmental protection goals of the 1978 Act, they were limited to consideration of the degree of control achievable by application of the "state of the art." Clearly, costs were not to be weighed against the health protection benefits achievable by use of feasible control measures. If public exposure to "radiation health hazards" could feasibly be "eliminated," such as would be achieved by adop-

tion of the 2 pCi standard (according to EPA), then that level of protection should have been required. If the radiation health hazards could not be feasily eliminated, then "radiation health hazards" were to be "minimized" to the extent feasible.

The congressional directive to "eliminate" if feasible, or otherwise minimize radiation health hazards was not compromised by the 1983 amendment authorizing consideration of costs. First, it is important to note that the language defining the central policy of the Act to "minimize or eliminate radiation health hazards to the public" was not amended, or otherwise undermined by the amendment. On the contrary, the conferees made it extremely clear that they had no intent "to divert EPA and NRC from their principal focus on protecting the public health and safety. . . ." H.R. Rep. No. 97-884, *supra*, 47. They made a special effort in the committee report to emphasize that

> [a]t all times, the conferees fully intend that EPA and NRC recognize as their *paramount responsibility* protection of the public health and safety and the environment.

Id. 47 (emphasis added). These declarations of the conference committee demonstrate that by adding authority to consider cost, Congress did not amend by implication or otherwise compromise or undermine the basic policy goal of the 1978 Act.

This conclusion is also supported by the committee's approval of the regulatory approaches taken by both NRC and EPA *prior* to the deliberations of the conferees. The committee debates on the cost amendment occurred in August 1982, and the committee report was printed in September. At that time, more than four months prior to

EPA's first decision to adopt a cost-benefit approach for setting radon standards in the inactive site rulemaking, the committee saw itself as merely providing authority for the approaches that both NRC and EPA had previously adopted in dealing with the cost question:

> The conferees note that this language reflects accurately the current regulatory approach of the agencies. The language agreed to by the conferees should not result in any delays of establishment of remedial action standards. EPA, for example, has already advised the conferees that it is considering costs in formulating its inactive site requirements. In addition, the NRC has testified before Congress that it, too, took costs into account in promulgating its Uranium Mill Licensing Requirements.

H.R. Rept. No. 97-884, *supra*, 47.

In order to understand what Congress thought it was approving, it is necessary to review the public positions both agencies had taken prior to the summer of 1982. In the case of the NRC, it had adopted final tailings disposal standards pursuant to UMTRCA. 45 Fed. Reg. 65521 (October 3, 1980). In review proceedings before the Tenth Circuit, as well as in the rulemaking, the NRC argued that costs were relevant only to the extent they were considered as part of a determination that the standards are "feasible," i.e., both technologically and economically feasible.[22] The committee members made frequent references

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22. NRC's interpretation of UMTRCA was affirmed by a panel of the Tenth Circuit in an opinion handed down on March 23, 1982, or about four months prior to the deliberations of the conference committee. *Kerr-McGee Nuclear Corp. v. NRC*, 673 F.2d 1124 (10th Cir. 1982); vacated pending rehearing en banc. The order granting rehearing was issued after publication of the conference report. Further proceedings in that case have been stayed pending further action by the NRC in response to the EPA regulations that are the subject of this proceeding.

to the opinion of the panel of the Tenth Circuit sustaining NRC's regulations and were obviously aware of both the NRC's argument and the panel's approval of the NRC's position. In fact, the committee report went out of its way to state that the cost amendment was not intended to "affect[] any pending litigation or appeal of judicial decisions based on the fundamental missions or responsibilities of the agencies." H.R. Rept. No. 87-884, *supra*, 47. It would appear that the committee specifically intended to approve the NRC's interpretation of the Act and not disturb the March 1982, opinion of the Tenth Circuit with regard to that question.

The official pronouncements of EPA on the cost question prior to the summer of 1982 were consistent with the NRC's position and gave no warning of the major shift in policy that would be revealed months later in the final inactive site standards. EPA had initially proposed a 2 pCi standard for radon emissions from inactive piles (46 Fed. Reg. 2562, January 9, 1981), and explained in its draft EIS, p.8-6, that the Agency was justified in considering other factors, such as cost, once a marginal level of health benefit is achieved. Thus in choosing between standards at 2 pCi and 0.5 pCi, EPA considered cost a relevant factor because either standard would "avert virtually all these cancer deaths [from radon]." EPA's proposal had rejected cost as a factor in determining the acceptability of less stringent standards that would allow many cancer deaths.

While there is no discussion by the committee of EPA's 1981 proposal that would suggest the committee members were as aware of EPA's earlier treatment of the issue as they were of the NRC's interpretation of the Act affirmed by the Tenth Circuit, the committee nonetheless

expressed approval of EPA's approach. The committee's obvious satisfaction with EPA's initial approach is further evidenced by enactment of the last sentence of 42 U.S.C. 2022(a) as part of the 1983 amendment. That amendment directed DOE to proceed with implementation of the remedial action program at the inactive sites based on EPA's *proposed standards* if final EPA action was not forthcoming by the revised statutory deadline.

At no point prior to the committee's deliberations was there any hearing testimony or other communication from EPA that revealed an intent to abandon the earlier approach and adopt the cost-benefit approach used here. If the conferees were aware of OMB's July 1982 letter to EPA, it would appear that the committee's specific rejection of cost-benefit analyses in the report must have been designed to put the OMB demand to rest. Unfortunately, EPA has ignored the committee's intent and has carried its economic justification for rejecting more protective standards far beyond the limits authorized by the 1983 amendment.

EPA's use of OMB's "optimized cost-benefit" approach for setting health protection standards under UMTRCA is not consistent with the statute, legislative history or the prior decision of this Court. Foisted on EPA over the opposition of Agency attorneys who, according to John Daniel, were of the opinion that it was illegal, the optimized cost-benefit approach is now appearing in many other contexts of agency decision-making. This case presents an uncommon opportunity to decide whether Congress ever intended to allow the Administrator unbridled discretion to sacrifice achievable health benefits solely on the basis of cost. Kepford is right: OMB may not coerce EPA to use cost-benefit analysis to set health

standards when the statute does not authorize cost-benefit analysis.

CONCLUSION

For these reasons, UNC's and AMC's petitions for a writ of certiorari should be denied, and the Kepford petition should be granted.

Respectfully submitted,

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